



**Washington State
Department of Transportation**
Sid Morrison
Secretary of Transportation

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Aviation Division

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April 10, 1998

The Honorable William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Docket No. FCC 97-182 & FCC 98-458

Dear Secretary Caton:

On March 20, 1998, the Federal Communications Commission released Notice of Supplemental Proposed Rule, Docket Number 98-458 titled, Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities. The following correspondence reflects the comments of the Washington State Department of Transportation Aviation Division whether the rule proposed would have a significant environmental impact and what the impact would be.

It is the opinion of the Washington State Department of Transportation Aviation Division that the proposed rulemaking presents significant environmental impacts, will be in direct conflict with the preservation of aviation safety, and lead to the development of incompatible land uses adjacent to airports. The best available intelligence on the historic aircraft accident trends affecting surrounding land uses at airports illustrates a direct correlation between aircraft accidents and incompatible land uses. A decision approving such a rule forces cities and counties to assume the additional and significant liability associated with the placement of incompatible land uses next to or on the approach to an airport.

The environmental impact statement, at a minimum, must evaluate the increased risks associated with the preemption of state and local land use guidelines allowing for incompatible land uses adjacent to airports, associated liability to local jurisdictions and developers in allowing the development of incompatible land uses adjacent to airports,

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the economic losses associated with the reduction of service by the airport should an obstruction affect the approach to an airport, and the failure to preserve airports as essential public facilities.

In Washington State, land use guidance is provided through the Growth Management Act. In RCW 36.70A.510, cities and counties are required to protect airports from incompatible land uses. Schools, residential development, broadcast facility development adjacent or on the approach to an airport is considered an incompatible land use. Public-use airports in Washington State are considered essential public facilities which must be preserved. The preemption of RCW 36.70A.510 would remove the provisions in place to protect our quality of life and preserve safety around airports. The liability and risk associated with placing incompatible land uses adjacent to airports is high.

In *Reminga v. United States*, the district court entered judgment for the plaintiffs upon a finding that acts and omissions of two federal regulatory agencies were negligent. While several provisions were overturned on appeal, the district court found negligence and proximate cause in agency actions and omissions when a small private plane struck a guy wire which supported a tall television tower. First, the government was found negligent for publishing a sectional chart which showed the TV tower; the Federal Aviation Administration was found negligent in issuing a "no hazard determination" when construction of the tower was proposed; and the FAA and FCC were found negligent for failing to require additional lighting and marking so as to safeguard pilots who are in areas where towers and guy wires exist to keep from striking the facilities.

The courts clarified the FAA's authority in assessing airspace obstructions, finding very limited ability to protect pilots from unsafe structures or the authority to enforce compliance of the FAA mitigation requirements. None of the mitigation requirements allows for FAA to recommend the project proponent to move a facility. In the case of *Reminga*, the pilots were at the wrong place at the wrong time. They were not capable of flying in weather conditions and were unable to follow published landing procedures. FAA evaluates obstructions based upon published approaches to an airport, the evaluation does not take into consideration lost or disoriented pilots, severe weather conditions or mechanical problems interfering with the operation of the aircraft on approach to an airport. A "no hazard determination" does not constitute safe flying conditions.

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Cities and counties are not protected under the Federal Tort Claims Act as the FAA and FCC are covered. The assessment of risk associated with land use decision-making must take into account the associated liability with such decisions. Cities and counties are required to protect the health, safety and welfare of their constituencies. The environmental impacts associated with the preemption of state and local zoning are enormous since the rule ignores the mandate to protect the health, safety and welfare.

Not only must an environmental impact statement be performed, but the EIS must provide assurance that the health, safety and welfare of people will be protected despite ignoring the state and local land use provisions put in place to ensure that protection.

Public-use airports, contained in the Washington State Aviation System Plan, are formally recognized under the Growth Management Act as essential public facilities and must be preserved and protected from incompatible land uses.

The WSDOT Aviation Division strongly recommends the request to accept the Notice of Proposed Rulemaking, be denied.

The FCC would be careless if, at a minimum, an environmental impact statement not evaluate the increase risks associated with the preemption of state and local land use guidelines allowing for incompatible land uses adjacent to airports, associated liability to local jurisdictions and developers in allowing the development of incompatible land uses adjacent to airports, the economic losses associated with the reduction of service by the airport should an obstruction affect the approach to an airport, and the failure to preserve airports as essential public facilities.

Thank you for the opportunity to comment on this serious matter.

Sincerely,



Theresa Smith
Manager, Aviation Planning

cc: Henry Ogrodzinski, President, National Association of State Aviation Officials
Rick Daniels, Intergovernmental Relations Director, WSDOT
William H. Brubaker, Director for Aviation, WSDOT